IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON, DIVISION II

NO. 42902-1-II

APPEAL FROM CLALLAM COUNTY NO. 09-1-00296-1

STATE OF WASHINGTON,

Respondent,

vs.

STACI ALLISON,

Appellant.

BRIEF OF RESPONDENT

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ISSUE ONE

When the trial court receives briefing, supplemental briefing and responsive briefing and hears argument on four different occasions about the State's failure to provide all documentation well before trial, when the trial court determines that the late discovery is favorable to the defendant so suppression is not appropriate and sanctions would serve no purpose, has the trial court sufficiently established that dismissal is not an appropriate sanction in this case.

ISSUE TWO

Whether the "money laundering" statutes, RCW 9A.83 *et.seq.*, when read as a whole, provide a complete statutory scheme to encompass financial transactions and proceeds from other unlawful activity, including forfeiture.

ISSUE THREE

Is the trial court's determination that Ms. Allison should pay $51,905.33 supported by the facts presented at trial, such that the restitution order is directly related to Clallam County's loss and the trial court did not abuse its discretion?

STATEMENT OF THE CASE

On May 29, 2009, the State of Washington charged Staci Allison with one count of theft in the first degree and one count of money laundering (CP 3). The theft count charged that she wrongfully obtained or exerted control over property in a series of transactions which were part of a criminal episode or a common scheme or plan. The motion for determination of probable cause (CP 2) contained page 18 of 18 of an investigation conducted by "S.L. Stockwell" who determined that Ms. Allison had stolen $51,251.33 from the Clallam County Sheriff's evidence room. The money laundering charge was supported by a forensic financial review conducted by the Federal Bureau of Investigation, showing $9,000 to $11,000 in money Ms. Allison had deposited in her checking account that could not be accounted for by reviewing legitimate deposits from other sources. The forensic review also showed spending on trips that could not be supported by her income information.

On 8/12/2010, both the State and Ms. Allison reported

ready for trial (CP 69):

> Defense is prepared and ready to go. Readiness order entered previously. All discovery has been delivered and Mr. Anderson [has] gone thru. Court did not need def to appear by phone [sic]. She has been consistent with phone appearances.

On 9/13/2010, the parties appeared for the first day of trial (CP 83). Although both parties proceeded to choose a jury and the trial court ruled on motions in limine, Ms. Allison also made an oral motion to dismiss because she had just received "the executive summary of the first audit....Apparently there may be a box of other materials and I may very well want to call [the] State Patrol person because they found all kinds of problems in the property room [about] which I was not aware of until 8:30 this morning." (9/13/2010 RP 7, 16).

The State responded that, although it was prepared to go trial, "in a bit of hyper-vigilance," she had asked the Clallam County Sheriff's Office again whether the State had received the entire case discovery (9/13/2010 RP 24). She had been told there was no audit report, but learned for the first time that one may exist when she spoke Chief Deputy Ron Cameron

(9/13/2010 RP 24). She then contacted the public records division of the Washington State Patrol and learned about the additional records, which filed "a box" (9/13/2010 RP 25). She immediately ordered the new documents (9/13/2010 RP 25).

The State also pointed out that page 178 of the investigative case log referred to an audit, so Ms. Allison was not completely surprised (9/13/2010 RP 25).

The trial court stated it was disinclined to dismiss the case at this point because it was not clear how long it would take to review the new material. Mr. Allison's "speedy trial" period expired 30 days from this date so the trial court considered whether the case should be continued (9/13/2010 RP 36). The trial court held that, although one audit had been mentioned in the discovery, it appeared a second audit (not of money, but of weapons and drugs in the evidence room) may be significant to the defense (9/13/2010 RP 36).

After a recess, the State informed the trial court that the

new discovery was "a paper ream size of documents" (9/13/2010 RP 41). The documents would take a week to copy but the State was driving to Olympia and would retrieve them for counsel (9/13/2010 RP 41). Ms. Allison very reluctantly agreed to a continuance because she needed time to review the documents (9/13/2010 RP 44). The trial was continued to October 11, 2010 (9/13/2010 RP 45).

On October 1, 2010, the parties met for a pretrial conference. Ms. Allison stated she still needed a copy of a report she alleged was prepared by former Sergeant Kelly, the husband of the Clallam County Prosecutor (10/1/2010 RP 4). She also stated she needed a continuance because she believed there were "some relatively juicy dismissal issues" that she would need a week or two to brief (10/1/2010 RP 4). Because the deputy prosecutor who had represented the state had left the prosecutor's office, Ms. Kelly would have to try the case, but Ms. Allison intended to prepare a motion to disqualify her (10/1/2010 RP 4).

Ms. Kelly objected to the continuance because the deputy prosecutor would still be available for the assigned trial date (10/1/2010 RP 7). The State responded that Sergeant Kelly did not remember whether he wrote a report but the Sheriff's Department was still looking to see whether anybody did a formal report because he was not the only officer present when the money was found (10/1/2010 RP 6). What Sergeant Kelly had prepared during the investigation was provided to the defense on October 1, 2010 (10/1/2010 RP 10).

The trial court *sua sponte* raised the issue of court availability on October 11, 2010 (10/1/2010 RP 9). With only one judge available that day, there was no judge available to start the trial (10/1/2010 RP 9). The trial court noted a continuance would mean the deputy prosecutor would not be available for the trial (10/1/2010 RP 9). Ms. Allison admitted she had read the discovery that was provided after the September 13, 2010 hearing but indicted she had not cross referenced it (10/1/2010 RP 10).

After hearing further argument, the trial court left the matter on the 10/11/2010 as a date by which Ms. Allison would prepare and serve her motions (10/1/2010 RP 12).

On 10/11/2010, Ms. Allison counsel filed what she purported to be a motion to disqualify Ms. Kelly (CP 91). The motion included allegations that Sergeant Kelly had assisted in the audit of Ms. Allison, had found $5,000 that had not been previously located, and therefore this was "*Brady* material." The motion alleged Sergeant Kelly's alleged role in the investigation would mean that Mrs. Kelly must disqualify herself. Because the prosecutor's office had not provided Sergeant Kelly's notes until October 1, 2010, Ms. Kelly violated the RPCs and should be disqualified. The entire office should be disqualified. A special prosecutor [sic] would have to be found. The motion included a few informal opinions addressing whether an attorney should conduct a case in which his or her spouse was a witness.

On October 13, 2011, Ms. Allison filed her motion to

dismiss (CP 95). The motion to dismiss contained only the same arguments that had been raised on at least three prior occasions.

On November 3, 2010, the State responded. The response included facts already mentioned, but also included facts not reported before:

1. The WSP investigation/audit was concluded in early December 2006.

2. Don Kelly, retired from the Clallam County Sheriff's Department, was hired to help straighten up the evidence room, destroy or return evidence no longer needed for trial and to ensure that evidence was properly documented.

3. Don Kelly found $5,000 in cash on March 1, 2007.

4. Sometime after May 2007, the lead WSP detective forwarded his investigative log and investigative report. The report was deemed insufficient for prosecution.

5. Clallam County detectives were assigned to complete the investigation. The case was forwarded again to the prosecutor's

office and a deputy prosecutor filed a charge of theft in the first degree on May 29, 2009.[1]

6. The case then languished because the first defense attorney withdrew, the second defense attorney was not retained, and present defense counsel had a serious heart condition that required surgery.

7. Trial was rescheduled to January 11, 2010, but defense counsel requested it be postponed until May 3, 2010. Ms. Soublet became the State's deputy prosecutor on the case.

8. In February 2010, Ms. Soublet requested assistance from law enforcement to prepare the case, but assistance did not come until later.

9. On June 2, 2010, Ms. Soublet met with the lead county investigator and Chief Criminal Deputy Cameron to compare files. She learned the investigation file contained 650 pages of information that had not been provided to defense counsel.

10. On June 2, 2010, Ms. Allison requested a green notebook

[1] The information contained both a count of theft in the first degree and a count of money laundering.

that she had maintained in the evidence room. Ms. Soublet learned the notebook was in the possession of the Washington State Patrol; it was provided June 17, 2010.

11. Ms. Soublet continued to feel uneasy about whether she had seen all of the information collected. Trial was set to begin September 13, 2010 (CP 93). Clallam County's lead investigator stated he had not seen any Washington State Patrol records, so she contacted the head of the state patrol audit team on September 7, 2010 and discovered audit materials about which the county had no knowledge.

12. The new discovery was provided to Ms. Allison on September 20, 2010.

13. On September 13, 2010, Ms. Allison first raised an issue about whether Don Kelly had prepared a report.

14. On October 1, 2010, Ms. Allison asked to continue the case so she could prepare a motion to dismiss and a motion to disqualify counsel. The State opposed the motion because Ms. Soublet's final day was October 15, 20120.

Based upon the above, the State argued the trial court should not dismiss the case or rule that Ms. Kelly must withdraw because defense counsel may call her husband as a witness.

The trial court issued an opinion on January 27, 2011, denying the motion to dismiss (CP 119, attached as Appendix A). Essentially, the trial court determined that dismissal was inappropriate. The delays to produce the additional discovery had not prejudiced the defendant; rather the delays were to review material that benefitted the defendant. The Court also determined the delays were excusable because the State had attempted to provide all the discovery.

On February 1, 2011, the trial court issued a memorandum opinion denying defendant's motion to disqualify counsel. Essentially, after a review of the Rules of Professional Conduct and a few informal opinions, the trial court stated that it found nothing automatically creating a conflict when the two spouses were employed by the same employer. The trial court

did not find any additional facts that, in this case, would warrant disqualification.

Scott Marlow, an assistant attorney general, substituted for Ms. Kelly (State's Supp. CP 151). An amended information was filed on September 15, 2011 (State's Supp. CP 158). It did not modify the two charges from the first information and the trial court found it did not prejudice Ms. Allison. (State's Supp CP 159). Trial commenced on 10/17/2011 but testimony began 10/18/2009 (CP 179).

Chris James, an administrative coordinator with the Clallam County Sheriff's Office (10/18/2011 RP 116), had been Ms. Allison's immediate supervisor (10/18/2011 RP 123). On November 27, 2006, Chris James entered the evidence room to remove Ms. Allison's personal belongings from the area around the safe so more department items could be stored there (10/18/2011 RP 136). She had been trying to get Staci Allison, the evidence technician, to organize and clean up the evidence room for some time (10/18/2011 RP 125). While she was

looking behind Ms. Allison's desk, she discovered an unnumbered bin (10/18/2011 RP 137). A bin number is important because evidence was placed in a numbered bin to show the evidence's location (10/18/2011 RP 137). She looked into the bin and saw a yellow legal pad and a hard card evidence sheet. The hard card evidence sheet was odd because these cards are supposed to be in a file cabinet (10/18/2011 RP 138). When she picked up the evidence sheet, she saw several money envelopes that were supposed to be in the safe (10/18/2011 RP 138). She shut the box and went to tell Alice Hoffman, her supervisor (10/18/2011 RP 138). She met Chief Cameron at Alice's office and returned to the evidence room to get him the key to a vehicle. When they could not find the key, she pointed out the tub (10/18/2011 RP 138). Ms. James picked up one envelope from which coins fell out; Chief Cameron saw it and said the tub would have to be audited (10/18/2011 RP 139).

Ron Cameron, captain of investigations with the Clallam

County Sheriff's Department in 2006 (10/18/2011 RP 7), testified that, on November 27, 2006, he needed to get into the evidence room to obtain a key for a vehicle (10/18/2011 RP 8). Perhaps because of a heavy snowfall, Staci Allison, the evidence specialist assigned to the evidence room (10/18/2011 RP 10), did not come to work (10/18/2011 RP 13). He asked Chris James, one of only two other people with keys and codes to the evidence room (10/18/2011 RP 11-12), to let him in. They could not find the key to the vehicle (10/18/2011 RP 14). Ms. James expressed her frustration about the disorganization in the evidence room (10/18/2011 RP 14-16), and turned to a Rubbermaid tub that contained currency envelopes which should have been in the safe (10/18/2011 RP 16). When Ms. James pulled out one envelope, some change fell out; Captain Cameron realized that something was wrong (10/18/2011 RP 16). They called in chief civil deputy Alice Hoffman, who was perplexed as well (10/18/2011 RP 18). The three attempted to figure out why open envelopes were sitting in the tub

(10/18/2011 RP 18). It became clear that money was missing out of most of the envelopes so the room was secured so that only Captain Cameron had further access ((10/18/2011 RP 19). Two detectives and an administrator to the sheriff began an audit of the tub, but then were ordered to stop the audit and contact the Washington State Patrol (10/18/2011 RP 21-22).

Steven Stockwell, a Washington State Patrol detective in 2006 (10/19/2011 RP 10), audited the contents of the tub. After ascertaining that none of the missing funds had been returned or disbursed in any appropriate manner, he concluded that the envelopes in the tub were missing $51,905.33 (10/19/2011 RP 21-22).

The jury heard testimony from former Detective Stockwell about the number $9,802.19. He had learned that Staci Allison made 49 unauthorized deletions from the AEGIS computer tracking system on May 24, 2006 (10/19/2011 RP 22-23). Of these deletions, 16 deletions related to envelopes in the blue tub (10/19/2011 RP 22-23). The AEGIS system deletions

related to money items from 11 separate cases that contained 23 separate money envelopes (10/19/2011 RP 24). The records showed that $9,802.19 was missing from these 23 envelopes (10/19/2011 RP 24).

Patrick Gahan, a special agent with the Federal Bureau of Investigations (10/19/2011 RP 54), testified about Ms. Allison's bank records from January 2003 through February 2007, a 50 month period (10/19/2011 RP 63). Ms. Allison had only one bank account (10/19/2011 RP 62). During the first 2/3rds of the 50 month period, Ms. Allison maintained a pretty consistent zero balance from month to month (10/19/2011 RP 64). She averaged 8 overdrafts per month, tallying just shy of $10,000 in overdraft charges (10/19/2011 RP 64). Her known deposits included her pay check, a yearly tax refund, and a $2,000 loan from her father (10/19/2011 RP 64). Prior to May 2003, she had augmented her income with payday loans (10/19/2011 RP 65). For 24 months, from May 2003 through May 2006 [sic; should be May 2004 through May 2006], there were no payday

loans (10/19/2011 RP 65). By November 2003, Ms. Allison used payday loans less frequently (10/19/2011 RP 66). Increasing numbers of cash deposits, not attributable to any known source, totaling $11,000.00, could not be explained by any known source (10/19/2011 RP 64-65).

Agent Gahan also testified to Ms. Allison's spending. He testified that Ms. Allison made "several overseas trips, I believe three trips to Soule, South Korea and one trip to Disneyland" ((10/19/2011 RP 67). He found no records showing she had used a credit card or debit card while traveling, which he termed unusual (10/19/2011 RP 67-68).

Agent Gahan finally testified that, beginning on May 23, 2006, the day before she deleted that AEGIS records, she again obtained a payday loan (10/19/2011 RP 68). The loans continued through the remainder of the investigation period (10/19/2011 RP 68). There were no payday loans from May of 2004 and May of 2006 (10/19/2011 RP 68).

ARGUMENT

ISSUE ONE

When the trial court receives briefing, supplemental briefing and responsive briefing and hears argument on four different occasions about the State's failure to provide all documentation well before trial, when the trial court determines that the late discovery is favorable to the defendant so suppression is not appropriate and sanctions would serve no purpose, has the trial court sufficiently established that dismissal is not an appropriate sanction in this case.

RESPONSE

The trial court correctly determined that dismissal was not an appropriate remedy for late discovery, when the Clallam County Sheriff's Department failed for a five month period to provide information to the deputy prosecuting attorney who sought it, heard the deputy prosecuting attorney's efforts to obtain full discovery, saw that the discovery was favorable to the defendant, and was totally knowledgeable about the issue before it.

STANDARD OF REVIEW

A trial court's ruling under CrR 8.3 (b) is reviewed for a manifest abuse of discretion. *State v. Michielli,* 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A "manifest" error is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *State v. Lynn,* 67 Wn.App. 339, 345, 835 P.2d 251 (1992). "Discretion is abused when the trial

court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *State v. Blackwell,* 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (citing to *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

ANALYSIS

A failure to provide discovery may be sanctioned. CrR 4.7 (7). The trial court may address the problem by permitting a continuance, but it also has authority to dismiss a criminal information. CrR 4.7 (7) (i). The trial court has authority to impose other orders or, if the failure is a willful violation, impose appropriate sanctions. CrR 8.3 (b) permits a court to dismiss a criminal prosecution upon a showing of arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. Simple mismanagement is sufficient to show governmental misconduct. *Michielli,* 132 Wn.2d at 239, 937 P.2d 587. Dismissal is an extraordinary

remedy to which the court should resort only in "truly egregious cases of mismanagement or misconduct." *State v. Price,* 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

Upon the facts of this record, the trial court did not abuse its discretion when it denied Ms. Allison's motion to dismiss. *State v. Smith,* 67 Wn.App. 847, 841 P2d 65 (1992) quoted *State v. Sherman,* 59 Wn.App. 763, 770-71, 801 P.2d 274 (1990) to hold the question of "an appropriate remedy is fact-based determination that must be resolved on a case-by-case basis.")

The trial court laid out all the prior proceedings in the case, including that the file had been developed by two different deputy prosecutors and by two different defense counsel. The State never objected to a defense request for continuance until October 1, 2010. That objection then was because the deputy prosecutor's last day fell within the trial period. Prior to that date, the State had agreed to all continuances Ms. Allison's counsel requested.

The trial court also credited the deputy prosecutor for refusing to accept the word of law enforcement that no further discovery existed. The trial court referenced *State v. Wilson,* 108 Wn.App. 774, 31 P.3d 43 (2001), which held that, in some circumstances, a deputy prosecutor's failure to comply with a discovery order could be excused. In *Wilson,* the deputy prosecutor agreed to provide access to the alleged victim, but the victim refused to cooperate.

In this case, the State is not saying that no one refused to cooperate with this deputy prosecutor, but they sat on their hands, the left hand not knowing what the right hand knew. It was only by the persistence of the deputy prosecutor that further discovery, beneficial to the defendant, was found.

Wilson was affirmed by the Washington Supreme Court. *State v. Wilson,* 149 Wn.2d 1, 65 P.3d 657 (2003). The Supreme Court held that the deputy prosecutor acted diligently in attempting to comply with the trial court discovery order. The Supreme Court further found that the deputy prosecutor

"did not engage in unfair gamesmanship...." *Wilson,* 149 Wn.2d at 10-11, 65 P.3d 657. Like the deputies in *Wilson* (and *Blackwell)* the deputy prosecutor in this case pushed law enforcement to provide information they denied existed (and, in some cases, of which they were not aware). She clearly explained to the trial court that she wanted to ensure that Ms. Allison had all existing discovery.

The deputy prosecutor's actions take this case far away from *Sherman.* In *Sherman,* the appellate court focused on the state's failure to provide IRS records (or even order them) as the reason that dismissal was appropriate, but the case also included a type of gamesmanship that *State v. Michielli, supra,* rejected. The state had also filed a motion to reconsider, an amended information, an amended witness list to include an expert witness. It engaged in a form of "unfair gamesmanship" that *Wilson* rejected as appropriate and *Michielli* rejected as unfair.

In *Michielli,* the majority[2] agreed the trial court had authority to dismiss a criminal case because it concluded that amending the information five days before trial to add four additional charges amounted to harassment. The court further held that the delay in amending the information did not fairly treat the defendant.

In this case, the trial court also reviewed whether providing late discovery prejudiced Ms. Allison. Because the late discovery was beneficial to Ms. Allison, sanctions and suppression were not appropriate alternatives to a continuance. The trial court noted that Ms. Allison had been given every continuance she asked for and the State had only objected once. Both of these reasons, in addition to the lack of gamesmanship showed by the deputy prosecutor, support the trial court's decision. The trial court correctly determined that dismissal was not an appropriate remedy.

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[2] Justice Alexander dissented, stating the majority was expressing "feelings of sympathy" for the defendant so dismissal was not an appropriate remedy.

The facts in *State v. Brooks,* 149 Wn.App. 373, 203 P.3d 397 (2009) show what a truly egregious case of mismanagement looks like. The State provided the first discovery after the omnibus hearing; after two continuances, it still failed to deliver all of the discovery before the first day of trial. Tape recorder malfunction had made one defendant's statements difficult if not impossible to transcribe. An officer's report had not been completed and a witness list was not provided until trial. Long delay in providing discovery once the State received it. Slow transcription of records. No subpoena to the alleged victim. The State's explanation included facts of life for a strapped police department, malfunctioning equipment and a change of deputy prosecutors assigned to the case. The trial court dismissed the prosecutions, most likely because it did not believe the State had a plan to quickly provide all the missing information.

In the present case, the facts are exactly the opposite. The new deputy prosecutor attempted to perfect her file as soon

as she was assigned the case. It was only because she refused to accept the Sheriff's Department's statement that there was no undisclosed discovery that the new discovery came to light. She was quick to notify defense counsel and offered to pick up the discovery herself while in Olympia. There was no gamesmanship being played by the deputy prosecutor. As frustrating as the scenario was, the trial court saw the entire episode unfold and determined that dismissal was not appropriate under these facts. This court should affirm the trial court's decision.

ISSUE TWO

Whether the "money laundering" statutes, RCW 9A.83 *et.seq.*, when read as a whole, provide a complete statutory scheme to encompass financial transactions and proceeds from other unlawful activity, including forfeiture.

RESPONSE

RCW 9A.83.010, passed as the "money laundering" bill in 1992, encompasses only one general subject, providing definitions, criminal penalties, exceptions and a forfeiture process for proceeds illegally placed in a financial institution or for otherwise specified unlawful activity

ANALYSIS

A copy of Laws of 1992, chapter 210, is attached as Appendix B.

The State accepts the citations to authority provided by Ms. Allison. She correctly points out that she bears a heavy burden to show a statute is unconstitutional and, further, that her burden is to show "there is no reasonable doubt that the statute violates the constitution." She has not met that burden.

The money laundering statutory scheme contains a definitional section, a criminal sanctions section, a seizure and forfeiture section, a hold harmless section, and then appends RCW 69.50.505 in modified form to provided the process by which a board or seizing law enforcement agency must account for forfeited property under section 3 of the bill. As Ms. Allison pointed out, the question is whether either subject is necessary to implement the other. *Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 217, 11 P.3d 762 (2001). Taken together, each section provides a step or part of the

whole process, from defining the issue to the steps necessary to report the forfeiture. There is a rational unity to the sections because section 5 details how forfeiture property is to be sold, reported, funds reported to the state, etc. This follows section 3, which provides which proceeds are forfeitable. The sections are rationally related to each other. The statutory scheme is constitution.

ISSUE THREE

Is the trial court's determination that Ms. Allison should pay $51,905.33 supported by the facts presented at trial, such that the restitution order is directly related to Clallam County's loss and the trial court did not abuse its discretion?

RESPONSE

The trial court correctly determined that restitution should include Clallam County's entire loss based on testimony from Detective Stockwell that the blue bin was missing $51,905.33, that Ms. Allison's computer deletions and the location of the blue bin showed Ms. Allison's theft of money was connected to the blue bin, and her deposits and other extravagant spending proved substantial basis to show she was responsible for the entire loss from evidence envelopes in the blue box or bin

STANDARD OF REVIEW

The trial court has discretion to determine the size of a restitution award and we will not disturb that determination

absent an abuse of that discretion. *State v. Pollard,* 66 Wn.App. 779, 785, 834 P.2d 51, *review denied,* 120 Wn.2d 1015, 844 P.2d 436 (1992). We will find abuse of that discretion only where its exercise is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Pollard,* 66 Wn.App at 785, 834 P.2d 51, (quoting *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). If substantial evidence supports the amount of restitution ordered, there is no abuse of discretion. *Pollard,* 66 Wn.App. at 785, 834 P.2d 51.

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(2012.

ANALYSIS

The trial court must base its restitution determination "on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3). Easily ascertainable damages are those tangible damages that the State proves by sufficient evidence. *State v. Tobin,* 132 Wn.App. 161, 173, 130 P.3d 426 (2006), *aff'd,* 161 Wn.2d 517, 166 P.3d 1167 (2007). " 'Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' " *Pollard,* 66 Wn.App. at 785, 834 P.2d 51 (quoting *State v. Mark,* 36 Wn.App. 428, 434, 675 P.2d 1250 (1984)).

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(2012.

The trial court stated the following when it ordered restitution in the full amount:

> The issue in this case is whether or not the full amount of $51,905.33 can be proven to the satisfaction of the Court by a preponderance of the evidence as having been the money that was frankly taken, and for which Ms. Allison is responsible for [sic].
>
> ...I do note as Mr. Marlow says this money was found in a single tub. It was not money which was found missing elsewhere in the room. The procedures that were testified to were fairly significant. Ms. Allison's other circumstances certainly were strong indications of her guilt, she was clearly associated with the blue tub in that that's where some of her belongings were found as well.
>
> ...I'm satisfied at least by a preponderance of the evidence that the $51,905.30 is appropriately imposed as restitution and I will do so.

Restitution hearing report of proceedings, March 20, 2012, pages 6-7.

The facts presented to the trial court support the restitution award. Former Detective Stockwell audited the blue tub. He found that $51,905.33 was missing from envelopes in the blue tub. He also testified that Ms. Allison deleted AEGIS records that related to some of the missing money. 16 deletions related to the blue tub. The deletions involved $9,802.19 from 11 cases with 23 evidence bags found in the blue tub. The

$9,800.00 number relates only to 16 deletions and not to the total loss.

FBI agent Patrick Gahan testified that, during a three year period, Ms. Allison did not augment her checking account balance with pay day loans; that during this time, an amount that was at least $9,000.00 and could have been $11,000.00 were placed in the account from unidentifiable sources; that Ms. Allison took three trips to South Korea and a trip to Disneyland; with no cash transactions, except one, showing in her checking account; that the day before she deleted the 49 AEGIS records she obtained a pay day loan for the first time in three years; and that she deleted the records the day before an audit of the evidence was to be performed.

Ms. James testified to the proximity of the blue tub to Ms. Allison's work station. She noticed the blue tub when she was in Ms. Allison's work station, while attempting to clear away clutter in front of the safe. The blue tub did not contain any items that could be personally identified as belonging to

Ms. Allison, but her personal items were in the same location. The tub's location in her work station, near her personal items, made it an object that she had to see each day she worked.

All these factors, including the audit of the blue tub, the records she deleted from AEGIS, the change in income to her account, the trips, and the location of the tub as it related to her daily work were sufficient to show a causal connection by a preponderance of the evidence. The trial court did not abuse its discretion by ordering restitution in the entire amount.

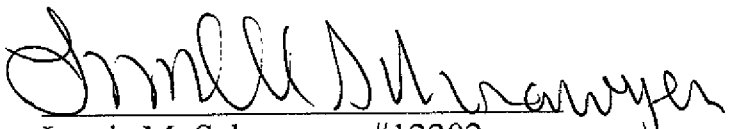
CONCLUSION

The trial court correctly decided that the discovery violation was not sufficiently egregious to require dismissal. Dismissal is meant to be an extraordinary remedy that applies to extraordinary violations involving gamesmanship or denial of a fair trial to a defendant. Ms. Allison has failed to show that the "money laundering" statutory scheme is unconstitutional beyond a reasonable doubt; she is not able to because the sections encompass only one subject. The trial

court that ordered restitution provided over the trial. The court knew the facts. This court should affirm Ms. Allison's conviction.

Respectfully submitted this 31st day of January, 2013.

DEBORAH KELLY, Prosecutor

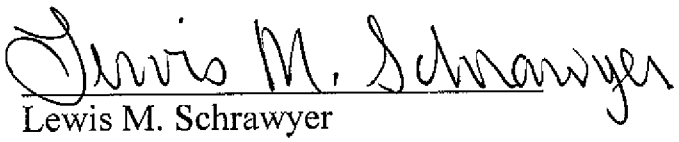


Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
Clallam County

CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to backlundmistry@gmail.com on January 31, 2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer

APPENDIX A

SUPERIOR COURT OF WASHINGTON COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff,

vs.

STACI L. ALLISON,

Defendant.

NO. 09-1-00206-1

MEMORANDUM OPINION ON MOTION TO DISMISS

Defendant moves to dismiss on the basis that the State's provision of discovery on the morning of trial violated the Defendant's due process rights and dismissal is warranted under either CrR 4.7 of CrR 8.3.

A. HISTORY:

A summary of the history of this case may be of some assistance.

The Defendant was previously employed by Clallam County and worked in the evidence room. It is alleged that the Defendant took money from the evidence room in an amount sufficient to constitute Theft in the First Degree.

The case was filed on May 29, 2009, and a summons was issued to the Defendant. The Defendant was arraigned on June 19, 2009, and a trial was set for August 17, 2009. The Defendant's attorney was allowed to withdraw on July 16, 2009. The Defendant was then unable to retain a private counsel, and on August 17, the date

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trial had initially been set, the Public Defender's Office was appointed. The Public Defender's Office determined they would have a conflict and a conflict attorney, Ralph Anderson, the Defendant's present attorney, was appointed on September 4, 2009. Trial was set by agreement for November 16, 2009, at that time.

On October 22, 2009, the Defendant moved to continue the trial and trial was continued until January 11, 2010. On December 17, 2009, there was another agreed resetting of the trial to May 3, 2010. On April 15, 2010, the Defendant moved to continue the trial indicating that defense was not fully prepared. A new trial date of June 28, 2010, was set. On May 27, 2010, the Defendant stated that the defense was ready for trial. On June 17, 2010, the Defendant again moved for a continuance indicating that there was new discovery which needed to be reviewed. The trial was reset to September 13, 2010. On August 12, 2010, the defense said that they were ready to go.

On Friday, September 10, 2010, the parties appeared in Court and a jury questionnaire form was approved. On Monday morning September 13, 2010, the parties appeared for trial. At that time, the issue of additional discovery was raised. The defense moved to continue the trial but reserved making a motion to dismiss. The State indicated it could not object to a continuance under the circumstances. The trial was reset within speedy trial to October 11, 2010. On October 1, 2010, the defense moved to continue alleging that the new material was too voluminous to allow review prior to

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the October 11, 2010 trial date, and, indicating that a motion to dismiss based on the late discovery would be filed as well as a motion to remove the Prosecutor due to conflict. The State objected to the continuance. The continuance, however, was granted and trial was set to January 24, 2011.

The material which is at issue constitutes an executive summary of an audit of the evidence room procedures at the Clallam County Sheriff's Department by the Washington State Patrol. A copy of the executive summary of the audit was obtained by a law enforcement officer much earlier (June 2009), however, but was not provided to the lead investigator and, accordingly, was not provided to the prosecutor. There is a brief mention of the audit in discovery. The Deputy Prosecutor handling the case, in preparing for trial, noted the reference to such an audit and began tracking down information related to the audit and discovered the audit sometime the week prior to the September date set for trial. The materials which accompanied the whereabouts of the audit included the underlying audit data which consisted of a banker's box full of reports and documents all in possession of the W.S.P. The parties agree that the information is beneficial to the Defendant, in that the audit discloses a poorly managed evidence room with a lack of internal controls. In argument the State concedes that discovery violations occurred in this trial. The State acknowledges that at the very least there was a failure to provide discovery. The State alleges that the error was only that there was more discovery available than that which the Prosecutor knew about.

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B. ANALYSIS:

CrR 4.7 governs discovery in criminal cases, and sets forth specific obligations of the parties in providing pretrial discovery. It is clear that under the rule the State was required to produce the executive summary of the evidence room audit and likely the supporting documents which were clearly in the control of a State agency.

CrR 8.3(b) provides as follows:

> "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affects the accused's right to a fair trial."

CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution "on its own motion in the furtherance of justice."

> "This power to dismiss is discretionary and is reviewable only for manifest abuse of discretion." State v. Burri, 87 Wn. 2d 175, 183, 550 P. 2d 507, 513 (1976); State v. Surgrove, 19 Wn. App. 860, 863, 578 P. 2d 74 (1978).

> "'Governmental misconduct' need not be of an evil or dishonest nature, simple mismanagement is sufficient." State v. Surgrove, 19 Wn. App. 860 at 863.

> "Dismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial. State v. Baker, 78 Wn.

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> 2d 327, 332, 474 P. 2d 254 (1970). Dismissal of charges is unwarranted in a case where suppression of evidence may eliminate whatever prejudice is cause by government misconduct. State v. Marks, 114 Wn. 2d 724, 733, 790 P. 2d 138 (1990). Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense..." State v. Price, 94 Wn. 2d 810, 814, 620 P. 2d 994 (1980).

Both parties have cited to what appears to be the leading case in the State of Washington, which is State v. Sherman, 59 Wn. App. 763, 801 P. 2d 274 (1990). In Sherman when the case came to trial the State had not yet provided the defense with a separate and distinct witness list or IRS records that had been subject to an omnibus order to produce. Trial Court granted a Motion to Dismiss and concluded as a matter of law that the defendant's due process rights had been violated by the State's failure to provide discovery, by its filing of a Motion to Reconsider a discovery order after the date trial was to have commenced, its filing of an amended information after the scheduled trial date, and its attempt to expand the State's witness list on the day of trial. The Court reasoned that if each of these had been considered individually the actions might not require dismissal. The Court, however, found that when considered collectively the State's actions amounted to a violation of the defendant's due process rights. In Sherman the Supreme Court stated "The State's failure to produce the IRS records, in and of itself, is a sufficient ground on which to affirm the dismissal." The

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Supreme Court noted that the State had agreed to undertake production of the IRS records of the complaining witness and yet despite the agreement the State failed to produce the records and waited until the day after trial was to have begun to seek reconsideration of the order obligating them to produce the records. In regards to prejudice the Sherman Court stated:

> "Nor do we find persuasive the State's argument that the defendant should have sought a continuance to allow time for the State to produce the records. Here, the speedy trial expiration date had been extended a total of seven times, and was scheduled to expire again on the day the case was dismissed. To require Mead to request a continuance under these circumstances would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense. The Supreme Court recognized this problem in State v. Price, 94 Wn. 2d 810, 814, 620 P. 2d 994 (1980)." Sherman, *supra*, at page 769.

In Sherman the Court then stated:

> "We agree that if the state inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights." Sherman, *supra*, at page 770.

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The Sherman Court then stated: "We believe that the question of whether dismissal is an appropriate remedy is a fact specific determination that must be resolved on a case by case basis." (Sherman, pages 770-771.)

Here, suppression of the evidence disclosed following the commencement of trial would be of no benefit to the Defendant. The evidence is recognized by all parties to be of benefit to the Defendant. Imposition of terms and/or costs, similarly, will not eliminate any prejudice to the Defendant. The defense seeks to present evidence indicating that there has been actual harm to the Defendant in terms of lost employment opportunities and the like. The Court does not believe that such information is relevant. The prejudice to the Defendant must be to the Defendant's due process rights. Here, if a defendant is forced to waive a right to a speedy trial in order to be prepared for trial, the law presumes that there has been prejudice. The issue before the Court is whether, under the total circumstances of this case, the actions of the State and the prejudice which was incurred should require a dismissal of the charges.

In State v. Wilson, 108 Wn. App. 774, 31 P. 3d 43 (2001) the Appellate Court stated: "In ruling on a defendant's dismissal motion based on the Prosecutor's failure to fulfill the Prosecutor's promise to assist defense counsel with discovery, the trial court should consider whether the Prosecutor's failure to accomplish the task is excusable, and whether the Prosecutor could have legally compelled or accomplish the act."

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The Wilson Court noted that the Sherman decision was based in part on the Prosecutor's unexcused conduct.

In the context of post-trial review of discovery failures courts have stated that dismissal is an extraordinary remedy and should be granted only when the defendant's rights were so prejudiced that a new trial cannot resolve the errors. State v. Laureano, 101 Wn. 2d 745, 762-763, 682 P. 2d 889 (1984). (Overruled on other grounds by State v. Brown, 111 W. 2d 124, 761 P. 2d 588 (1988).

C. CONCLUSION:

It is frustrating to this court and no doubt to the parties that discovery which should have been disclosed early on was not. Unlike Sherman, however, it does not appear that there was any willful intent or malfeasance involved in the materials not being discovered. It is clear that there is misfeasance on the part of law enforcement, and, perhaps mismanagement by the Prosecuting Attorney's office for not determining at an earlier date that not all likely discovery was available. Nevertheless this is a complex case involving thousands of documents of discovery (or so the Court has been told), a great deal of forensic accounting and performance auditing. There have been numerous continuances of the trial. Some necessitated by the Defendant's difficulty in obtaining counsel, others necessitated by the nature of the case, and occasionally by defense counsel's illness. The State objected only to the last continuance requested and

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either did not object or agreed to the others to accommodate the defense. The reset on the day of trial was within speedy trial limits. The executive summary contained the gist of the relevant testimony. Defense then requested additional time which was granted. This Court is granted some discretion in making a determination. Under the totality of the circumstances the Court does not feel that a dismissal of the case is warranted. While the facts causing the delay in the case are unfortunate, the Court does not find them so egregious as to warrant the extraordinary remedy of dismissal. A trial on the merits by fully prepared counsel can resolve significant issues of prejudice to the fact finding function. Accordingly the Motion to Dismiss on the basis of the late discovery is denied.

DATED this 27th day of January, 2011.

Respectfully submitted,

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APPENDIX B

CHAPTER 210

[Second Substitute Senate Bill 5318]

MONEY LAUNDERING

Effective Date: 6/11/92

AN ACT Relating to money laundering; amending RCW 9A.82.010; reenacting and amending RCW 69.50.505; adding a new chapter to Title 9A RCW; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** The definitions set forth in this section apply throughout this chapter.

(1) "Conducts a financial transaction" includes initiating, concluding, or participating in a financial transaction.

(2) "Financial institution" means a bank, savings bank, credit union, or savings and loan institution.

(3) "Financial transaction" means a purchase, sale, loan, pledge, gift, transfer, transmission, delivery, trade, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, or any other acquisition or disposition of property, by whatever means effected.

(4) "Knows the property is proceeds of specified unlawful activity" means believing based upon the representation of a law enforcement officer or his or her agent, or knowing that the property is proceeds from some form, though not necessarily which form, of specified unlawful activity.

(5) "Proceeds" means any interest in property directly or indirectly acquired through or derived from an act or omission, and any fruits of this interest, in whatever form.

(6) "Property" means anything of value, whether real or personal, tangible or intangible.

(7) "Specified unlawful activity" means an offense committed in this state that is a class A or B felony under Washington law or that is listed in RCW 9A.82.010(14), or an offense committed in any other state that is punishable under the laws of that state by more than one year in prison, or an offense that is punishable under federal law by more than one year in prison.

NEW SECTION. **Sec. 2.** (1) A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:

(a) Knows the property is proceeds of specified unlawful activity; or

(b) Knows that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity; or

(c) Knows that the transaction is designed in whole or in part to avoid a transaction reporting requirement under federal law.

(2) In consideration of the constitutional right to counsel afforded by the Fifth and Sixth amendments to the United States Constitution and Article 1,

Section 22 of the Constitution of Washington, an additional proof requirement is imposed when a case involves a licensed attorney who accepts a fee for representing a client in an actual criminal investigation or proceeding. In these situations, the prosecution is required to prove that the attorney accepted proceeds of specified unlawful activity with intent:

(a) To conceal or disguise the nature, location, source, ownership, or control of the proceeds, knowing the property is proceeds of specified unlawful activity; or

(b) To avoid a transaction reporting requirement under federal law.

The proof required by this subsection is in addition to the requirements contained in subsection (1) of this section.

(3) An additional proof requirement is imposed when a case involves a financial institution and one or more of its employees. In these situations, the prosecution is required to prove that proceeds of specified unlawful activity were accepted with intent:

(a) To conceal or disguised the nature, location, source, ownership, or control of the proceeds, knowing the property is proceeds of specified unlawful activity; or

(b) To avoid a transaction reporting requirement under federal law.

The proof required by this subsection is in addition to the requirements contained in subsection (1) of this section.

(4) Money laundering is a class B felony.

(5) A person who violates this section is also liable for a civil penalty of twice the value of the proceeds involved in the financial transaction and for the costs of the suit, including reasonable investigative and attorneys' fees.

(6) Proceedings under this chapter shall be in addition to any other criminal penalties, civil penalties, or forfeitures authorized under state law.

NEW SECTION. **Sec. 3.** (1) Proceeds traceable to or derived from specified unlawful activity or a violation of section 2 of this act are subject to seizure and forfeiture. The attorney general or county prosecuting attorney may file a civil action for the forfeiture of proceeds. Unless otherwise provided for under this section, no property rights exist in these proceeds. All right, title, and interest in the proceeds shall vest in the governmental entity of which the seizing law enforcement agency is a part upon commission of the act or omission giving rise to forfeiture under this section.

(2) Real or personal property subject to forfeiture under this chapter may be seized by any law enforcement officer of this state upon process issued by a superior court that has jurisdiction over the property. Any agency seizing real property shall file a lis pendens concerning the property. Real property seized under this section shall not be transferred or otherwise conveyed until ninety days after seizure or until a judgment of forfeiture is entered, whichever is later. Real property seized under this section may be transferred or conveyed to any person or entity who acquires title by foreclosure or deed in lieu of foreclosure

of a security interest. Seizure of personal property without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant issued pursuant to RCW 69.50.502; or

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter.

(3) A seizure under subsection (2) of this section commences proceedings for forfeiture. The law enforcement agency under whose authority the seizure was made shall cause notice of the seizure and intended forfeiture of the seized proceeds to be served within fifteen days after the seizure on the owner of the property seized and the person in charge thereof and any person who has a known right or interest therein, including a community property interest. Service of notice of seizure of real property shall be made according to the rules of civil procedure. However, the state may not obtain a default judgment with respect to real property against a party who is served by substituted service absent an affidavit stating that a good faith effort has been made to ascertain if the defaulted party is incarcerated within the state, and that there is no present basis to believe that the party is incarcerated within the state. The notice of seizure in other cases may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail is complete upon mailing within the fifteen-day period after the seizure.

(4) If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of the property within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the property seized shall be deemed forfeited. The community property interest in real property of a person whose spouse committed a violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation.

(5) If a person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of property within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The provisions of RCW 69.50.505(e) shall apply to any such hearing. The seizing law enforcement agency shall promptly return property to the claimant upon the direction of the administrative law judge or court.

(6) Disposition of forfeited property shall be made in the manner provided for in RCW 69.50.505(g) through (i) and (m).

NEW SECTION. **Sec. 4.** No liability is imposed by this chapter upon any authorized state, county, or municipal officer engaged in the lawful

performance of his duties, or upon any person who reasonably believes that he is acting at the direction of such officer and that the officer is acting in the lawful performance of his duties.

Sec. 5. RCW 69.50.505 and 1990 c 248 s 2 and 1990 c 213 s 12 are each reenacted and amended to read as follows:

(a) The following are subject to seizure and forfeiture and no property right exists in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter or chapter 69.41 or 69.52 RCW, and all hazardous chemicals, as defined in RCW 64.44.010, used or intended to be used in the manufacture of controlled substances;

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW;

(3) All property which is used, or intended for use, as a container for property described in paragraphs (1) or (2);

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in paragraphs (1) or (2), except that:

(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter or chapter 69.41 or 69.52 RCW;

(ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent;

(iii) No conveyance is subject to forfeiture under this section if used in the receipt of only an amount of marijuana for which possession constitutes a misdemeanor under RCW 69.50.401(e);

(iv) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission; and

(v) When the owner of a conveyance has been arrested under this chapter or chapter 69.41 or 69.52 RCW the conveyance in which the person is arrested may not be subject to forfeiture unless it is seized or process is issued for its seizure within ten days of the owner's arrest;

(5) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter or chapter 69.41 or 69.52 RCW;

(6) All drug paraphernalia;

(7) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW: PROVIDED, That a forfeiture of money, negotiable instruments, securities, or other tangible or intangible property encumbered by a bona fide security interest is subject to the interest of the secured party if, at the time the security interest was created, the secured party neither had knowledge of nor consented to the act or omission: PROVIDED FURTHER, That no personal property may be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission which that owner establishes was committed or omitted without the owner's knowledge or consent; and

(8) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance, or which have been acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property: PROVIDED, That:

(i) No property may be forfeited pursuant to this subsection, to the extent of the interest of an owner, by reason of any act or omission committed or omitted without the owner's knowledge or consent;

(ii) The bona fide gift of a controlled substance, legend drug, or imitation controlled substance shall not result in the forfeiture of real property;

(iii) The possession of marijuana shall not result in the forfeiture of real property unless the marijuana is possessed for commercial purposes, the amount possessed is five or more plants or one pound or more of marijuana, and a substantial nexus exists between the possession of marijuana and the real property. In such a case, the intent of the offender shall be determined by the preponderance of the evidence, including the offender's prior criminal history, the amount of marijuana possessed by the offender, the sophistication of the activity or equipment used by the offender, and other evidence which demonstrates the offender's intent to engage in commercial activity;

(iv) The unlawful sale of marijuana or a legend drug shall not result in the forfeiture of real property unless the sale was forty grams or more in the case of marijuana or one hundred dollars or more in the case of a legend drug, and a substantial nexus exists between the unlawful sale and the real property; and

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(v) A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party, at the time the security interest was created, neither had knowledge of nor consented to the act or omission.

(b) Real or personal property subject to forfeiture under this chapter may be seized by any board inspector or law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Seizure of real property shall include the filing of a lis pendens by the seizing agency. Real property seized under this section shall not be transferred or otherwise conveyed until ninety days after seizure or until a judgment of forfeiture is entered, whichever is later: PROVIDED, That real property seized under this section may be transferred or conveyed to any person or entity who acquires title by foreclosure or deed in lieu of foreclosure of a security interest. Seizure of personal property without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(3) A board inspector or law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The board inspector or law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(c) In the event of seizure pursuant to subsection (b), proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property. Service of notice of seizure of real property shall be made according to the rules of civil procedure. However, the state may not obtain a default judgment with respect to real property against a party who is served by substituted service absent an affidavit stating that a good faith effort has been made to ascertain if the defaulted party is incarcerated within the state, and that there is no present basis to believe that the party is incarcerated within the state. The notice of seizure in other cases may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail shall be deemed complete upon mailing within the fifteen day period following the seizure.

(d) If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (a)(4), (a)(7), or (a)(8) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the item seized shall be deemed forfeited. The community property interest in real property of a person whose spouse committed a violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation.

(e) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(8) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction if the aggregate value of the article or articles involved is more than five hundred dollars. The court to which the matter is to be removed shall be the district court when ((~~such~~)) the aggregate value ((~~is ten thousand dollars or less~~)) of personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In a court hearing between two or more claimants to the article or articles involved, the prevailing party shall be entitled to a judgment for costs and reasonable attorney's fees. In cases involving personal property, the burden of producing evidence shall be upon the person claiming to be the lawful owner or the person claiming to have the lawful right to possession of the property. In cases involving real property, the burden of producing evidence shall be upon the law enforcement agency. The burden of proof that the seized real property is subject to forfeiture shall be upon the law enforcement agency. The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(8) of this section.

(f) When property is forfeited under this chapter the board or seizing law enforcement agency may:

(1) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter;

(2) ((~~(i)~~)) Sell that which is not required to be destroyed by law and which is not harmful to the public((~~. The proceeds and all moneys forfeited under this title shall be used for payment of all proper expenses of the investigation leading to the seizure, including any money delivered to the subject of the investigation by the law enforcement agency, and of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, actual costs of the prosecuting or city attorney, and court costs. Money remaining after the payment of all expenses shall be distributed as follows:~~

~~(A) Twenty five percent of the money derived from the forfeiture of real property and seventy five percent of the money derived from the forfeiture of personal property shall be deposited in the general fund of the state, county, and/or city of the seizing law enforcement agency and shall be used exclusively for the expansion or improvement of law enforcement services. These services may include the creation of reward funds for the purpose of rewarding informants who supply information leading to the arrest, prosecution and conviction of persons who violate laws relating to controlled substances. Such moneys shall not supplant preexisting funding sources;~~

~~(B) Twenty five percent of money derived from the forfeiture of real property and twenty five percent of money derived from the forfeiture of personal property shall be remitted to the state treasurer for deposit in the public safety and education account established in RCW 43.08.250;~~

~~(C) Until July 1, 1995, fifty percent of money derived from the forfeiture of real property shall be remitted to the state treasurer for deposit in the drug enforcement and education account under RCW 69.50.520, on and after July 1, 1995, the fifty percent of the money shall be remitted in the same manner as the twenty five percent of the money remitted under (2)(i)(A) of this subsection; and~~

~~(D) If an investigation involves a seizure of moneys and proceeds having an aggregate value of less than five thousand dollars, the moneys and proceeds may be deposited in total in the general fund of the governmental unit of the seizing law enforcement agency and shall be appropriated exclusively for the expansion of narcotics enforcement services. Such moneys shall not supplant preexisting funding sources.~~

~~(ii) Money deposited according to this section must be deposited within ninety days of the date of final disposition of either the administrative seizure or the judicial seizure~~));

(3) Request the appropriate sheriff or director of public safety to take custody of the property and remove it for disposition in accordance with law; or

(4) Forward it to the drug enforcement administration for disposition.

(g)(1) When property is forfeited, the seizing agency shall keep a record indicating the identity of the prior owner, if known, a description of the property, the disposition of the property, the value of the property at the time of seizure, and the amount of proceeds realized from disposition of the property.

(2) Each seizing agency shall retain records of forfeited property for at least seven years.

(3) Each seizing agency shall file a report including a copy of the records of forfeited property with the state treasurer each calendar quarter.

(4) The quarterly report need not include a record of forfeited property that is still being held for use as evidence during the investigation or prosecution of a case or during the appeal from a conviction.

(h)(1) By January 31st of each year, each seizing agency shall remit to the state treasurer an amount equal to ten percent of the net proceeds of any property forfeited during the preceding calendar year. Money remitted shall be deposited in the drug enforcement and education account under RCW 69.50.520.

(2) The net proceeds of forfeited property is the value of the forfeitable interest in the property after deducting the cost of satisfying any bona fide security interest to which the property is subject at the time of seizure, and in the case of sold property, after deducting the cost of sale, including reasonable fees or commissions paid to independent selling agents.

(3) The value of sold forfeited property is the sale price. The value of retained forfeited property is the fair market value of the property at the time of seizure, determined when possible by reference to an applicable commonly used index, such as the index used by the department of licensing for valuation of motor vehicles. A seizing agency may use, but need not use, an independent qualified appraiser to determine the value of retained property. If an appraiser is used, the value of the property appraised is net of the cost of the appraisal. The value of destroyed property and retained firearms or illegal property is zero.

(i) Forfeited property and net proceeds not required to be paid to the state treasurer shall be retained by the seizing law enforcement agency exclusively for the expansion and improvement of controlled substances related law enforcement activity. Money retained under this section may not be used to supplant pre-existing funding sources.

(j) Controlled substances listed in Schedule I, II, III, IV, and V that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, II, III, IV, and V, which are seized or come into the possession of the board, the owners of which are unknown, are contraband and shall be summarily forfeited to the board.

((~~(h)~~)) (k) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the board.

((~~(i)~~)) (l) The failure, upon demand by a board inspector or law enforcement officer, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate

registration or proof that he is the holder thereof constitutes authority for the seizure and forfeiture of the plants.

((~~(i)~~)) (m) Upon the entry of an order of forfeiture of real property, the court shall forward a copy of the order to the assessor of the county in which the property is located. Orders for the forfeiture of real property shall be entered by the superior court, subject to court rules. Such an order shall be filed by the seizing agency in the county auditor's records in the county in which the real property is located.

Sec. 6. RCW 9A.82.010 and 1989 c 20 s 17 are each amended to read as follows:

Unless the context requires the contrary, the definitions in this section apply throughout this chapter.

(1) "Creditor" means a person making an extension of credit or a person claiming by, under, or through a person making an extension of credit.

(2) "Debtor" means a person to whom an extension of credit is made or a person who guarantees the repayment of an extension of credit or in any manner undertakes to indemnify the creditor against loss resulting from the failure of a person to whom an extension is made to repay the same.

(3) "Extortionate extension of credit" means an extension of credit with respect to which it is the understanding of the creditor and the debtor at the time the extension is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(4) "Extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(5) "To collect an extension of credit" means to induce in any way a person to make repayment thereof.

(6) "To extend credit" means to make or renew a loan or to enter into an agreement, tacit or express, whereby the repayment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.

(7) "Repayment of an extension of credit" means the repayment, satisfaction, or discharge in whole or in part of a debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(8) "Dealer in property" means a person who buys and sells property as a business.

(9) "Stolen property" means property that has been obtained by theft, robbery, or extortion.

(10) "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

(11) "Control" means the possession of a sufficient interest to permit substantial direction over the affairs of an enterprise.

(12) "Enterprise" includes any individual, sole proprietorship, partnership, corporation, business trust, or other profit or nonprofit legal entity, and includes any union, association, or group of individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities.

(13) "Financial institution" means any bank, trust company, savings and loan association, savings bank, mutual savings bank, credit union, or loan company under the jurisdiction of the state or an agency of the United States.

(14) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:

(a) Murder, as defined in RCW 9A.32.030 and 9A.32.050;

(b) Robbery, as defined in RCW 9A.56.200 and 9A.56.210;

(c) Kidnapping, as defined in RCW 9A.40.020 and 9A.40.030;

(d) Forgery, as defined in RCW 9A.60.020 and 9A.60.030;

(e) Theft, as defined in RCW 9A.56.030, 9A.56.040, 9A.56.060, and 9A.56.080;

(f) Child selling or child buying, as defined in RCW 9A.64.030;

(g) Bribery, as defined in RCW 9A.68.010, 9A.68.020, 9A.68.040, and 9A.68.050;

(h) Gambling, as defined in RCW 9.46.220 and 9.46.230;

(i) Extortion, as defined in RCW 9A.56.120 and 9A.56.130;

(j) Extortionate extension of credit, as defined in RCW 9A.82.020;

(k) Advancing money for use in an extortionate extension of credit, as defined in RCW 9A.82.030;

(l) Collection of an extortionate extension of credit, as defined in RCW 9A.82.040;

(m) Collection of an unlawful debt, as defined in RCW 9A.82.045;

(n) Delivery or manufacture of controlled substances or possession with intent to deliver or manufacture controlled substances under chapter 69.50 RCW;

(o) Trafficking in stolen property, as defined in RCW 9A.82.050;

(p) Leading organized crime, as defined in RCW 9A.82.060;

(q) Money laundering, as defined in section 2 of this act;

(r) Obstructing criminal investigations or prosecutions in violation of RCW 9A.72.090, 9A.72.100, 9A.72.110, 9A.72.120, 9A.72.130, 9A.76.070, or 9A.76.180;

(((~~r~~))) (s) Fraud in the purchase or sale of securities, as defined in RCW 21.20.010;

(((~~s~~))) (t) Promoting pornography, as defined in RCW 9.68.140;

(((~~t~~))) (u) Sexual exploitation of children, as defined in RCW 9.68A.040, 9.68A.050, and 9.68A.060;

(((~~u~~))) (v) Promoting prostitution, as defined in RCW 9A.88.070 and 9A.88.080;

(((~~v~~))) (w) Arson, as defined in RCW 9A.48.020 and 9A.48.030;

(((~~w~~))) (x) Assault, as defined in RCW 9A.36.011 and 9A.36.021;

(((~~x~~))) (y) A pattern of equity skimming, as defined in RCW 61.34.020; or

(((~~y~~))) (z) Commercial telephone solicitation in violation of RCW 19.158.040(1).

(15) "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events. However, in any civil proceedings brought pursuant to RCW 9A.82.100 by any person other than the attorney general or county prosecuting attorney in which one or more acts of fraud in the purchase or sale of securities are asserted as acts of criminal profiteering activity, it is a condition to civil liability under RCW 9A.82.100 that the defendant has been convicted in a criminal proceeding of fraud in the purchase or sale of securities under RCW 21.20.400 or under the laws of another state or of the United States requiring the same elements of proof, but such conviction need not relate to any act or acts asserted as acts of criminal profiteering activity in such civil action under RCW 9A.82.100.

(16) "Records" means any book, paper, writing, record, computer program, or other material.

(17) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonograph record, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(18) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in the state in full or in part because the debt was incurred or contracted:

(a) In violation of any one of the following:

(i) Chapter 67.16 RCW relating to horse racing;

(ii) Chapter 9.46 RCW relating to gambling;

(b) In a gambling activity in violation of federal law; or

(c) In connection with the business of lending money or a thing of value at a rate that is at least twice the permitted rate under the applicable state or federal law relating to usury.

(19)(a) "Beneficial interest" means:

(i) The interest of a person as a beneficiary under a trust established under Title 11 RCW in which the trustee for the trust holds legal or record title to real property;

(ii) The interest of a person as a beneficiary under any other trust arrangement under which a trustee holds legal or record title to real property for the benefit of the beneficiary; or

(iii) The interest of a person under any other form of express fiduciary arrangement under which one person holds legal or record title to real property for the benefit of the other person.

(b) "Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in a general partnership or limited partnership.

(c) A beneficial interest shall be considered to be located where the real property owned by the trustee is located.

(20) "Real property" means any real property or interest in real property, including but not limited to a land sale contract, lease, or mortgage of real property.

(21)(a) "Trustee" means:

(i) A person acting as a trustee under a trust established under Title 11 RCW in which the trustee holds legal or record title to real property;

(ii) A person who holds legal or record title to real property in which another person has a beneficial interest; or

(iii) A successor trustee to a person who is a trustee under subsection (21)(a)(i) or (ii) of this section.

(b) "Trustee" does not mean a person appointed or acting as:

(i) A personal representative under Title 11 RCW;

(ii) A trustee of any testamentary trust;

(iii) A trustee of any indenture of trust under which a bond is issued; or

(iv) A trustee under a deed of trust.

NEW SECTION. **Sec. 7.** Sections 1 through 4 of this act constitute a new chapter in Title 9A RCW.

Passed the Senate March 8, 1992.
Passed the House March 5, 1992.
Approved by the Governor April 2, 1992.
Filed in Office of Secretary of State April 2, 1992.

CLALLAM COUNTY PROSECUTOR

January 31, 2013 - 10:59 AM

Transmittal Letter

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Case Name: State v. Staci Allison

Court of Appeals Case Number: 42902-1

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- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
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